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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

B5

DATE: MAR 30 2012 OFFICE: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner, identified on the petition as a "cam[p]ground/RV park," seeks to classify the beneficiary under section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability in business. The petitioner seeks employment as a partner/principal of [redacted] The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner has not shown that the beneficiary qualifies for classification as an alien of exceptional ability in business, and therefore did not proceed to a determination on the question of whether an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a brief from counsel and various supporting exhibits.

The AAO notes that the director received the petitioner's properly filed Form I-290B Notice of Appeal and accompanying materials on May 31, 2011. On June 2, 2011, the director received a second Form I-290B with a second fee, brief, and supporting exhibits. The second appeal is largely identical to the first, except that it is missing one exhibit (a letter from [redacted], and it includes new printouts from two web sites. Both appeals include briefs from counsel. Both briefs bear the same date (May 26, 2011) and contain the same basic assertions, but they are not identical. The regulations do not permit the filing of multiple simultaneous or overlapping appeals from a single decision. Furthermore, the second appeal was not timely filed under the U.S. Citizenship and Immigration Services (USCIS) regulation at 8 C.F.R. § 103.3(a)(2)(i). The AAO, therefore, cannot accept the second appeal as an independent filing. The AAO will, instead, consider the new exhibits to be supplements to the petitioner's properly-filed first appeal.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. –
>
> > (A) In General. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer –
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's

> services in the sciences, arts, professions, or business be sought by an employer in the United States.

The petitioner filed the Form I-140 petition on October 5, 2010. The record includes a document on [redacted] letterhead, which states: "Previously known as [redacted] (a sole proprietorship), the business now operates as [redacted]" Form I-140 identifies the petitioner as [redacted] The beneficiary is an owner of both [redacted] and [redacted] and both have used the name [redacted] but the record includes no documentary evidence that the petitioner and [redacted] are one and the same.

Form I-140 lists the petitioner's employer identification number [redacted] Tax documents submitted on appeal list [redacted] Official state business filing records show an August 13, 2003 [redacted] for the petitioning entity [redacted] in Pennsylvania, and a December 2, 2008 "Initial Filing Date" for [redacted] in Tennessee. Both entities are still in "active" status.[1] Therefore, the available evidence indicates that [redacted] and [redacted] are separate corporate entities.

The issue under consideration is whether the beneficiary qualifies for classification as an alien of exceptional ability in business. The USCIS regulation at 8 C.F.R. § 204.5(k)(3)(ii) states that, to show that the alien is an alien of exceptional ability in the sciences, arts, or business, the petition must be accompanied by at least three of the following:

> (A) An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability;
>
> (B) Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought;
>
> (C) A license to practice the profession or certification for a particular profession or occupation;
>
> (D) Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability;
>
> (E) Evidence of membership in professional associations; or

[1] Sources: https://www.corporations.state.pa.us/corp/soskb/Corp.asp?2051242 and http://tnbear.tn.gov/ECommerce/FilingDetail.aspx?CN=255020195042244118121180048144110247031168104123 (printouts added to record March 14, 2012).

> (F) Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations.

If the above standards do not readily apply to the beneficiary's occupation, the petitioner may submit comparable evidence to establish the beneficiary's eligibility. 8 C.F.R. § 204.5(k)(3)(iii).

The petitioner's initial submission included a letter from counsel stating that the petitioner seeks classification as an alien of exceptional ability in business, and a list of supporting exhibits, but neither the petitioner nor counsel addressed the six regulatory standards at 8 C.F.R. § 204.5(k)(3)(ii).

In an introductory statement, the beneficiary stated:

> I am immersed in the Recreation Industry here in the USA and pleased to report that my efforts to date have created jobs and helped other business owners and some governing bodies realize their potential. . . .
>
> During the past 5 years the product has grown into a variety of market sectors including the [redacted] and more. Most recently the product has been identified by the US Military as being suitable for their recreation facilities provided for the families of serving and ex-serving person[ne]l.
>
> . . . With each growth step and with each [redacted] installation it is estimated that we create the following impact:
>
> 1. Create one job at the point of the installation
> 2. Create one additional manufacturing job with every additional 50 installations
> 3. Create one additional installer job with every 30 installations
> 4. Provide fun and entertainment to an additional 1200 children and teenagers with every installation
> 5. Prevent one child from becoming obese with every installation
> 6. Help 25 obese children embrace physical activity
> 7. Provide 15 seriously disabled children with the opportunity to experience "life on the playground" in the same way as an able-bodied child.

The beneficiary indicated that he operates two publications:

> **Campground & RV Park E-News:**
> This is the only weekly newspaper circulated to 9600 Campground owners and Campground Industry associates and is currently producing its 115th edition. It provides industry news, industry statistics, education on a variety of subject matter[s]

> (including renewable energy, recycling, law, regulation etc.) and a platform for industry suppliers to showcase product and services.
>
> [redacted] is widely read and embraced by all state and national governing bodies and franchises.
>
> **GetawayUSA:**
> A monthly magazine which showcases the travel destinations and recreation opportunities of 4 states each issue. It has a focus on the wonders that abound in State and National Parks as well as travel and accommodation alternatives. . . .
>
> The first issue was circulated to 66mil. USA citizens and the second issue is about to be released.

(Emphasis in original.) The petitioner submits no evidence to support a number of assertions, such as the claim that 66 million people received copies of *GatewayUSA*. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

An overview of [redacted] indicates that the beneficiary is one of nine employees, and that "[w]hilst [redacted] keeps employment to a minimum it is responsible for the employment of many" by "engag[ing] the services of [seven] USA businesses to manufacture a broad range of components."

The petitioner submitted copies of the beneficiary's publications, along with witness letters and business documentation such as invoices and contracts. These materials establish that the beneficiary is, as claimed, involved in [redacted] and related publishing ventures, but they do not self-evidently establish exceptional ability under the regulatory standards at 8 C.F.R. § 204.5(k)(3)(ii).

One of the letters, from [redacted] of [redacted] and [redacted] indicated that the beneficiary "was involved with the [redacted] from 1997)."

On December 22, 2010, the director issued a request for evidence. The director quoted the list of six regulatory standards in full and asserted that the petitioner had to meet at least three of them. In this way, the director noted that the petitioner had not yet submitted the required evidence, and provided the petitioner with a final opportunity to do so before the director issued a decision. In response, the petitioner submitted a small number of exhibits, and counsel requested "an additional 30 days to send the remaining information." Additional time to respond to a request for evidence or notice of intent to deny may not be granted. 8 C.F.R. § 103.2(b)(8)(iv). All requested materials must be submitted together at one time, along with the original USCIS request for evidence or notice of

intent to deny. Submission of only some of the requested evidence will be considered a request for a decision on the record. 8 C.F.R. § 103.2(b)(11).

The petitioner's response to the request for evidence included a letter from counsel. The closest counsel came to addressing the regulatory requirements for exceptional ability was in the following passage:

> [The beneficiary] has over a decade of experience in his field of Campground/Agri-tourism and creation of innovative products, which qualify him as an exceptional professional, thereby qualifying him for eligibility to document the national interest value of his achievements, under INA §203(b)(2)(C), and the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-232, 105 Stat. 1733 (MTINA). Moreover, his distinguished record of accomplishment and documented track record of professional recognition conclusively demonstrate that he is already serving U.S. national interests to a **significantly** greater extent than other contributors to the field of Campground/Agri-tourism.

The above paragraph addresses 8 C.F.R. § 204.5(k)(3)(ii)(B) (ten years of experience) and 8 C.F.R. § 204.5(k)(3)(ii)(F) (recognition for achievements and contributions). Neither counsel nor the petitioner specifically claimed that the beneficiary meets a third regulatory criterion. The petitioner submitted five witness letters, with no explanation apart from counsel's general assertion that they were "from national and international authorities."

Counsel did not explain how the cited sections of law established the petitioner's eligibility. Section 203(b)(2)(C) of the Act reads, in its entirety:

> In determining under subparagraph (A) whether an immigrant has exceptional abil the possession of a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning or a license to practice or certification for a particular profession or occupation shall not by itself be considered sufficient evidence of such exceptional ability.

[redacted] which counsel also cited, is simply a list of amendments and technical corrections. It does not address exceptional ability in business at all.

The petitioner also submitted a copy of the beneficiary's résumé and five additional witness letters. The résumé listed seven employers from 1971 to the present, and indicated that the beneficiary belonged to four professional associations: the [redacted] the [redacted] and [redacted]

The director denied the petition on April 26, 2011. The director acknowledged that the witness letters attested to the petitioner's achievements and contributions under the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(F), but found that the petitioner had not met any other criterion of exceptional ability in business. The director stated: "The petitioner has not submitted the initial required evidence" to show membership in associations, and that the petitioner submitted "[n]o evidence other than the beneficiary's resume" to establish the beneficiary's employment experience. The director also found that the petitioner had submitted no evidence at all relating to the beneficiary's education, licensure or certification, or compensation. The director concluded: "As the petitioner has failed to establish that the beneficiary . . . qualifies as an alien of exceptional ability, the issue of whether a waiver of the job offer . . . would be in the national interest is moot."

The appeal, in this instance, is the petitioner's opportunity to cite errors of law or fact in the director's decision. It is not an opportunity to perfect the record by submitting evidence that the petitioner should have submitted previously; the request for evidence served that function. If the director requested specific evidence prior to the denial, and the petitioner did not submit it in response to that notice, then it is too late to submit that evidence on appeal. *See Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533, 537 (BIA 1988). If the petitioner had wanted particular evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* The AAO cannot find that the director erred by failing to consider unsubmitted evidence.

On appeal, counsel asserts "the Beneficiary "has met at 4 categories (B); (D); (E) and (F) pursuant to 8 C.F.R. section 204.5(k)(3)." The petitioner had originally failed to specifically identify the criteria under the regulation at 8 C.F.R. § 204.5(h)(3) that the beneficiary claimed to meet. It was not generally apparent from the review of the evidence to which criteria, if any, the evidence pertained. For this reason, among others, the director issued a request for additional evidence listing the complete regulatory standards under 8 C.F.R. § 204.5(k)(3)(ii). The burden is on the petitioner to establish the beneficiary's eligibility, not on the director to infer or guess the intended criteria. Counsel's statement in response to the notice mentioned only two criteria specifically, pertaining to the beneficiary's experience and achievements.

The four criteria claimed on appeal are as follows:

> *Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought.* 8 C.F.R. § 204.5(k)(3)(ii)(B)

Counsel observes that the petitioner had previously submitted a "Company Letter from the [beneficiary's] current employer," indicating that the beneficiary "has been the Managing Principal of the company since 1999 through the Present." The beneficiary himself signed the letter, as an official of his own company. The petitioner had also submitted [redacted] letter attesting to the beneficiary's employment in Australia from 1997 to 2003. These letters did not indicate whether or not the beneficiary's employment was full-time, and therefore they fail to meet the plain wording

of the regulation. The AAO notes that the petitioner acknowledges the seasonal nature of its business (outdoor recreation). Even if this were not the case, USCIS is under no obligation to presume past employment to have been full-time.

> *Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability.* 8 C.F.R. § 204.5(k)(3)(ii)(D)

Counsel notes that the petitioner had previously submitted copies of purchase orders, contracts, and other materials "showing the fiscal progress of the company." [redacted] is a legally distinct entity from the beneficiary, and the beneficiary is not the sole owner of [redacted] The income of [redacted] is not identical to the beneficiary's salary or other remuneration for services. The petitioner did not submit any evidence of the beneficiary's personal compensation either in the initial submission or in response to the request for evidence.

On appeal, the petitioner submits a copy of [redacted] Form 1065 U.S. Return of Partnership Income for 2009. The return shows $610,994 in gross receipts or sales. After expenses and deductions, the company reported an ordinary business loss of $63,848. The return indicates that [redacted] paid no salaries, which appears to contradict the claim (elsewhere in the record) that the company employs several full-time workers.

Also on appeal, the petitioner submits, for the first time, an undated letter from certified public accountant [redacted] who prepared the tax return described above. [redacted] stated that the beneficiary "currently draws $8,333.00 per month from [redacted] reflecting compensation amount of $100,000 yearly." The petitioner submitted no evidence to show that this level of compensation "demonstrates exceptional ability" as the regulation requires. [redacted] owner of [redacted] states in a new letter that the beneficiary's "remuneration is commensurate with that of a senior executive in the playground equipment supply industry," but that is not the standard that the beneficiary's remuneration must meet. Status as a "senior executive" is not synonymous with exceptional ability, particularly in an industry where one can establish one's own company and name oneself a senior executive of that company.

Furthermore, the assertion as to the salary the beneficiary "currently draws" does not establish his compensation at the time of filing. An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the application or petition. 8 C.F.R. § 103.2(b)(1). USCIS cannot properly approve the petition at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). A petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 175 (Comm'r 1998). The 2009 tax return does not reflect a $100,000 annual salary paid to the beneficiary, and a salary increase after the filing date cannot retroactively establish eligibility.

Beyond the facial sufficiency of the salary evidence, there is a more fundamental consideration. The director, in the request for evidence, had already instructed the petitioner to submit evidence of the beneficiary's compensation. The petitioner did not do so. Therefore, the petitioner did not choose to make any evidence of the beneficiary's compensation available to the director before the director rendered the decision.

The regulations require the petitioner to submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The petitioner submitted no evidence of the beneficiary's compensation either initially or in response to the request for evidence. Therefore, the director justifiably concluded that the petitioner has not met this regulatory requirement.

Evidence of membership in professional associations. 8 C.F.R. § 204.5(k)(3)(ii)(E)

Counsel notes that the petitioner claimed several memberships on his résumé. The résumé consists of a series of claims, rather than evidence in support of those claims. As noted previously, the claims of the beneficiary and/or the petitioner cannot take the place of documentary evidence.

The petitioner submits letters from executives of the [redacted] and the [redacted] As explained previously, new witness letters submitted on appeal cannot overcome the director's finding that such evidence was not already in the record prior to the denial.

Counsel's most persuasive assertion is the observation that the petitioner had previously submitted a letter from [redacted] RV Parks and Campgrounds. In that letter, submitted in response to the request for evidence, Ms. Profaizer referred to the petitioner as a member of her organization.

USCIS is bound by the evidentiary requirements set forth in the regulations at 8 C.F.R. § 204.5. *See Kazarian v. USCIS*, 596 F.3d 1115, 1221 (9th Cir. 2010), *citing Love Korean Church v. Chertoff*, 549 F.3d 749, 758 (9th Cir. 2008). Thus, before consideration can proceed any further, the petitioner must satisfy the plain wording of the regulatory requirements.

The plain language of the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(E) requires evidence of membership in professional associations, in the plural. Significantly, not all of the criteria at 8 C.F.R. § 204.5(k)(3)(ii) are worded in the plural. Other exceptional ability regulations refer to evidence in the singular (such as "a degree" or "a salary"), or a combination of singular and plural (such as "letter(s) from current or former employer(s)"). Thus, the AAO can infer that, when the regulatory language uses only the plural, that construction is integral to the meaning of the regulation. In a different context, federal courts have upheld USCIS's ability to interpret significance from whether the singular or plural is used

in a regulation. *See Maramjaya v. USCIS*, Civ. Act. No. 06-2158 (RCL) at 12 (D.C. Cir. March 26, 2008); *Snapnames.com Inc. v. Chertoff*, 2006 WL 3491005 at *10 (D. Or. Nov. 30, 2006) (upholding an interpretation that the regulatory requirement for "a" bachelor's degree or "a" foreign equivalent degree at 8 C.F.R. § 204.5(l)(2) requires a single degree rather than a combination of academic credentials).

[redacted] letter was the only evidence of any membership that the petitioner submitted before the denial of the petition. Therefore, the petitioner did not submit evidence of membership in professional associations. Furthermore, the plain language of the regulation refers to "professional associations." The regulation at 8 C.F.R. § 204.5(k)(2) defines a "profession" as "one of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation." The beneficiary's occupation is not listed in section 101(a)(32) of the Act, and the petitioner has not shown or even claimed that the beneficiary holds a bachelor's degree, let alone that his occupation requires one. Therefore, the record does not show that the [redacted] of [redacted] is a "professional association" as contemplated by the regulation.

For the above reasons, the AAO finds that the evidence that the petitioner submitted with the initial petition, and in response to the request for evidence, failed to establish the beneficiary's membership in professional associations. Under *Soriano*, the AAO will not consider evidence of additional memberships that the petitioner withheld until the appeal.

> *Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations.* 8 C.F.R. § 204.5(k)(3)(ii)(F)

The director had asserted that the petitioner had satisfied this requirement by submitting witness letters. Such letters, however, do not demonstrate the formal recognition contemplated by the regulation as worded. Awards, prizes, certificates, and similar honors are some of the means by which peers, governmental entities, or professional or business organizations "recognize" the achievements and contributions of exceptional persons in a given field. Witness letters, on the other hand, exist only because the petitioner or the beneficiary has selected friendly witnesses and solicited statements from them, for the specific purpose of supporting the petition. Exhibits that exist only in service of the petition are poor evidence of recognition by peers, governmental entities, or professional or business organizations. The AAO therefore withdraws the director's finding that the witness letters, by themselves, constitute evidence of recognition under the USCIS regulation at 8 C.F.R. § 204.5(k)(3)(ii)(F).

Had the petitioner submitted the requisite evidence under at least three of the evidentiary categories at 8 C.F.R. § 204.5(k)(3)(ii), in accordance with the *Kazarian* opinion, the next step would be a final merits determination that considers all of the evidence in the context of whether or not the petitioner has demonstrated that a waiver of a job offer would be in the national interest of the United States. 8 C.F.R. § 204.5(k)(4)(ii); *see also Kazarian,* 596 F.3d at 1119-20. As the petitioner has not submitted the

requisite evidence under at least three evidentiary categories, the appeal will be dismissed on this basis alone. The AAO will not conduct a final merits determination.[2]

For the reasons discussed above, the AAO affirms the director's finding that the petitioner has not established that the beneficiary qualifies for classification as an alien of exceptional ability in business. The AAO also agrees with the director's finding that, without a showing of eligibility for the underlying immigrant classification, a discussion of the national interest waiver application would be moot.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.

[2] The AAO maintains de novo review of all questions of fact and law. *See Soltane v. DOJ*, 381 F.3d at 145. In any future proceeding on motion or as a result of litigation, the AAO maintains the jurisdiction to conduct a final merits determination as the official who made the last decision in this matter. 8 C.F.R. § 103.5(a)(1)(ii). *See also* section 103(a)(1) of the Act; section 204(b) of the Act; DHS Delegation Number 0150.1 (effective March 1, 2003); 8 C.F.R. § 2.1 (2003); 8 C.F.R. § 103.1(f)(3)(iii) (2003); *Matter of Aurelio*, 19 I&N Dec. 458, 460 (BIA 1987) (holding that legacy INS, now USCIS, is the sole authority with the jurisdiction to decide visa petitions).